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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

No. 394

THE TRUST COMPANY OF CHICAGO, Administrator of Estate of Elizabeth Palmer Smith, deceased, and JASON PAIGE, as Executor of Estate of Carrie E. Paige, deceased and others,
Petitioners,

vs.

CITY OF CHICAGO, and others,
Respondents.

Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred.

Honorable
John Prystalski,
Chancellor.

Mandamus and Class Suit in Equity to Administer a Trust.

PETITION FOR WRIT OF CERTIORARI.

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THE TRUST COMPANY OF CHICAGO, Administrator of the Estate of Elizabeth Palmer Smith, Deceased, and others, Petitioners, vs. CITY OF CHICAGO, and others, Respondents.	Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred. Honorable John Prystalski, Chancellor. Mandamus and Class Suit in Equity to Administer a Trust.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

Petitioners, The Trust Company of Chicago, Administrator of the Estate of Elizabeth Palmer Smith, deceased, Jason Paige, Executor of Estate of Carrie E. Paige, Deceased, and all other persons in like situation with reference to condemnation judgments against the City of Chicago, pray the issuance of a writ of certiorari to re-

view the order of the Appellate Court of Illinois, First District, rendered November 7, 1945, (Tr.) and adhered to November 26, 1945. (327 Ill. App. 222; 63 N. E. 2d 615.) Immediately thereafter pursuant to Illinois Practice, (Chapter 110, Section 199; Illinois Revised Statutes; Civil Practice Act Section 75), your petitioners sought leave to appeal before the Supreme Court of the State of Illinois. That petition was denied by the Supreme Court of Illinois without any Opinion on March 13, 1946. On that date, and by that action the ruling made and the Opinion filed by said Appellate Court of Illinois, First District, became final for purposes of the present petition to this Supreme Court. On June 11, 1946, this Court entered an order extending until August 12, 1946, the time for presenting this petition for writ of certiorari.

By this record an appeal was taken by your petitioners to the Supreme Court of Illinois, from the Circuit Court of Cook County in Illinois (Tr. 57). The Circuit Court without an Opinion had dismissed the complaints; and the Supreme Court of Illinois without any Opinion transferred the appeal to the Appellate Court of Illinois, First District (Tr. 61). Thereby both of said Courts ruled adversely upon or they refused to consider the constitutional and federal questions which are properly stated and claimed and shown by the record and specially pleaded (Tr. 33-35; 67-77). The Courts of Illinois in this record by-passed the constitutional and federal questions, by means of assuming an imaginary road-block of a procedural nature. Petitioners say that procedural escape is evasion by unconstitutional administration. A full length brief will be printed and filed, after writ has been granted to petitioners.

STATEMENT AS TO JURISDICTION.

The Supreme Court of Illinois has filed no Opinion. The order made January 20, 1943, for transfer to Appellate Court of Illinois, First District, (Tr. 61-62) was made upon oral announcement by the Chief Justice at the time of oral argument in that Court. Motion and suggestions by appellants were promptly made before that Court (Tr. 62-77) to reverse said order. That motion summarized and restated the constitutional and federal questions that had been presented to the Circuit Court of Cook County and to the Supreme Court of Illinois (Tr. 67-77). That motion to reconsider was denied March 9, 1943, by the Supreme Court of Illinois (Tr. 78).

The record was before this Court No. 60 (320 U. S. 737) October Term, 1943. A motion then was made by the City of Chicago that the application was premature. This Court then denied that petition October 11, 1943. Your denial of review at that date probably was for reasons assigned by *Oswald* v. *Wolf*, 126 Ill. 542 at 546. We concede that former petition to this Court was premature.

Thereafter your petitioners docketed in the Appellate Court of Illinois, First District, the appeal from the Circuit Court of Cook County, as transferred by said order of the Supreme Court of Illinois. That Appellate Court filed an Opinion and affirmed the judgment of dismissal which had been entered by the Circuit Court: 327 Ill. App. 622 (Tr.).

Timely application for review by this Court is made again or before August 12, 1946, under an order for extension of time by this Court dated June 11th, 1946. This petition is presented within said extended time, in accordance with Section 237(b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

The Circuit Court of Cook County has "original jurisdiction of all causes in law and in equity" (Tr. 34). *Herb* v. *Pitcairn,* 392 Ill. 138. The Supreme Court of Illinois has primary Appellate jurisdiction to review constitutional questions, pursuant to Section 75 of the Practice Act of Illinois, and Article 6, paragraph 11 of the Constitution of Illinois (Tr. 75). All Courts have the positive duty to pass upon federal questions under the Constitutions: Article VI, paragraph 2 of the Constitution of the United States.

Your petitioners urge that said Appellate Court by its order and Opinion, and also the Circuit Court of Cook County and the Supreme Court of Illinois by orders without any Opinion, abdicated constitutional duty to your petitioners, and refused just remedy and failed to review and pass upon the constitutional and federal questions presented by this record to all said Courts of Illinois.

That in so doing said Courts arbitrarily seek to change the fundamental personal and property rights of your petitioners under the bill of rights of the Constitutions of the State of Illinois and the United States, into mere matters at the grace and permission of the Supreme Court and other Courts of Illinois (Tr. 74-76). Also to change the obligatory jurisdiction of the Supreme Court of Illinois into merely discretionary jurisdiction. Thereby your petitioners were denied an obligatory hearing as to their vested rights, their contractual rights, and equal application of law, contrary to Article VI, paragraph 2 and the fifth and fourteenth amendments to the Constitution of the United States, and contrary to due process of law. *People* v. *Kelly,* 361 Ill. 54 at 59, 60; *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208 at 212.

This petition makes challenge to the orders of dismissal by the Appellate Court and the Circuit Court (Abst.

14, 56). This petition supports the petition for rehearing which attacks the opinion of the Appellate Court (Tr. ff); and also said orders are action forbidden by the Constitution. This petition sustains and supports the complaint (Abst. 15 ff), and the motions and affidavits for plaintiffs (Abst. 9-11, 13 and 54), and the petition for rehearing (Tr. ff). To keep this petition within reasonable pages, we ask the Court to read those documents from the printed Record. Counsel assume that the Court comes with fair knowledge of the contents and meaning of those documents, when the Court approaches the matter of reading and passing upon this petition, and the merits of this appeal.

This is not a commonplace proceeding. Your petitioners were wronged by the defendants, who refuse to make an accounting for a trust; and now believe that they are wronged by a brusque opinion of the Appellate Court.

The Bligh Report (1 Bligh N. R. House of Lords 312 ff) and *Warner* v. *New Orleans,* 167 U. S. 467 at 477; 175 U. S. 129-132, show how complete a departure from historic chancery, has been committed in this case at bar by the opinion and ruling by the Appellate Court. That historic chancery is shown by the petition to be embedded within the Constitution of Illinois by specific language set forth by the original complaint and by this petition for leave to appeal. A full length brief will be printed and filed, after writ has been granted.

POINTS TO REVERSE APPELLATE COURT.

The first basic error of the Courts below is their refusal to recognize this case as a suit in equity and their dismissal of it as a suit at law. The complaint establishes that this suit is a class suit in equity, based upon

a constitutional lien for the enforcement of trust obligations. The Appellate Court cites a number of suits brought at law, but no equity suit. The Appellate Court, without the citation of any authority upon that point, and ignoring *C. & E. I. Ry. Co.* v. *Hay*, 119 Ill. 493 at 507, holds "that plaintiffs' theory of a trust, as set forth in their briefs, is without merit." The first new constitutional question made and urged in this case, was made by bringing a class suit in equity upon a constitutional lien for the enforcement of trust obligations. *No other case has been decided by the Illinois courts presenting this constitutional question.*

The second basic error in this case is the violation by the Courts below of the constitutional rights of plaintiffs to a trial under equal protection clause and under the due process clause of the Constitution of the United States of America. In this case, based upon the lien granted by the Constitution of Illinois and brought in equity to enforce the plaintiffs' constitutional rights, the plaintiffs are entitled to a hearing. None of the cases cited by the Appellate Court touches upon this question.

The third basic error of the Appellate Court is in its conclusion, "We therefore conclude that the order of transfer from the Supreme Court to this Court is tantamount to a ruling that no constitutional questions are involved." The transfer may be said to be a *ruling at that time*, that no "debatable" constitutional question was then involved. However, it was and remains the duty of the Appellate Court to apply the settled constitutional law of Illinois and the United States to this case. The opinion of the Appellate Court shows on its face that this was not done.

The fourth basic error in this case below was the refusal of the Courts below to recognize plaintiffs' constitutional right to just compensation, including costs and

interest. The five-year statute of limitations is not applicable to constitutional rights such as are involved in this case. The obligation of the City of Chicago as trustee for appellants is shown only by documents in writing. No obligation in writing can be governed by the five-year statute of limitations in Illinois. Chapter 83, Section 17, Revised Statutes of Illinois and annotations thereto.

A fifth basic error of the opinion under review is, that the Appellate Court overlooked the absence of any trial in the record at bar. Petitioners have not had a hearing. (Petition for rehearing at Tr.). They have not had an opportunity to present their evidence. The pleading for the plaintiffs clearly seeks to recover the *balance due on judgments* which are of record (Tr. 2-7 and 20 ff). Such judgments are vested property rights. *Hoyt Metal Co.* v. *Atwood,* 289 F. 453. The law does not require petitioners *by their pleading to set forth all their evidence.* Illinois Civil Practice Act, Sec. 42(2). The complaint by express language takes issue against all statutes of limitations as a defense (par. 49 at Tr. 47). If plaintiffs are not permitted to produce their evidence to sustain their pleadings, the petitioners are denied the fundamental constitutional right to a trial. The Appellate Court order and opinion has committed the wrong (Tr.).

The opinion by the Appellate Court is based upon rulings taken from the *Cohen* case, the *Blakeslee* case and the *Chapralis* case. In two of those cases *answers were filed, evidence was heard and a full constitutional trial was conducted.* All these cases are fully challenged, and shown to be not in point, by the petition herein for rehearing (Tr.).

Due Process in This Case Compels an Affirmative Defense By Answer

By plain statute, Section 43(4) of Illinois Civil Practice Act, (Smith-Hurd Illinois Statutes, Chapter 110, Sec. 167) and by clear decision, *Hansen* v. *Raleigh,* 391 Ill.

536; 63 N. E. 2d 851 at 857) the only manner by which the matters that are mentioned by affidavit (Tr. 12) could be presented or could be considered by the Court as defense would be by an answer. "The benefits • • • must be invoked as *an affirmative defense*" (page 857). The statute expressly requires an answer and the decision by the Supreme Court of Illinois in said case of *Raleigh* v. *Hansen,* refused to consider the affidavits. On the contray that Court decided and reversed that case by looking only at the complaint there pending. So doing in the case at bar Your Honors will see at paragraph 49 (Tr. 47) a definite refutation of any contention that might or that could be assumed to aid the defendants. In this record the defendants have no answer. The Courts of Illinois have ignored this record. They seek to try on affidavits of one party, matters which the Statute Section 43(4) positively requires to be brought to an issue by affirmative answer and a full trial.

Defense Affidavit Practice Is Forbidden By Modern Statutory Procedure.

The Courts below may have relied upon the abandoned procedural contention, which recently is stated by the *dissenting* opinion in *Bell* v. *Hood,* 66 S. Ct. 773 at 775. Throughout the case now at bar, your petitioners have insisted as a matter of law that they and not the Courts, have the right and the power to determine their own pleading. This Supreme Court, by its opinion April 1, 1946, in said case of *Bell* v. *Hood,* announced the law which confirms the procedural position and contention of your petitioners throughout this case. Your Honors said in *Bell* v. *Hood,* at page 775 as follows:

> "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth

Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of $3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent '*the party who brings a suit is master to decide what law he will rely upon, and* * * * *does determine whether he will bring a suit arising under the* * * * [Constitution or laws] *of the United States by his declaration or bill.' The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716. Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley* v. *Sinkler*, 179 U. S. 58, 64, 65, 21 S. Ct. 17, 20, 45 L. Ed. 84; *Swafford* v. *Templeton*, 185 U. S. 487, 491, 492, 22 S. Ct. 783, 784, 785; 46 L. Ed. 1005. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

"Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners *could actually recover*. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not

for a dismissal for want of jurisdiction. *Whether the complaint states a cause of action on which relief could be granted is a question of law* and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford* v. *Templeton,* 185 U. S. 487, 493, 494, 22 S. Ct. 783, 785, 786, 46 L. Ed. 1005; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305-308, 44 S. Ct. 96, 98-99, 68 L. Ed. 308."

Selection of procedure by the litigant was sustained also by this Court in the case of *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208 at 212. Your Honors there decided that the Courts cannot use procedural rulings as a road-block to avoid access to the substantial constitutional protection.

SUMMARY OF THE MATTER INVOLVED.

Elizabeth Palmer Smith filed in the Circuit Court of Cook County, her petition (Tr. 1) for writ of mandamus on October 23, 1933, to collect the *balance of a condemnation judgment,* entered in a local improvement proceeding in the County Court of Cook County, on June 2, 1926. Some payments were made on account as shown (Tr. 3, 23, 24). The City of Chicago and necessary officials were named as respondents to that petition (Tr. 5), and they remain the defendants to this suit at the present time. The respondents, by their counsel, filed a general demurrer on November 30, 1933, which was argued on many occasions in the Circuit Court of Cook County (Tr. 8). In January, 1934, respondents asked leave to withdraw the demurrer, and were given leave to file an answer, and later certain amendments to that answer. The plaintiff filed

motions to strike the answer and the amendments. Those motions were argued on various occasions, before the Circuit Court of Cook County, but no order was entered.

On May 20, 1940, respondents City of Chicago, and others, sought leave to withdraw all their answers and defenses, and to file a motion to dismiss the suit upon the sole ground that some statute of limitation had run against the suit (Tr. 8). An affidavit was filed in support of that motion, and the plaintiff filed a counter-affidavit (Tr. 9). The petition for mandamus and that counter-affidavit present facts and issues which are substantially the same as those set forth by the separate count in chancery as hereinafter stated. To simplify the petition we discuss the case in detail as stated by the count in chancery. What is said applies equally to the count for writ of mandamus.

In October, 1941, Elizabeth Palmer Smith died, and the Trust Company of Chicago, as Administrator of her estate, was substituted as plaintiff, by order of court on November 12, 1941 (Tr. 9). On that date the respondents asked leave to file an additional affidavit in support of their motion to dismiss (Tr. 12). The Trust Company of Chicago, as Administrator, filed a counter-affidavit and a motion to strike the motion of the defendants to dismiss, and to strike the affidavits in support of the motion by the defendants to dismiss (Tr. 9). These matters were briefed and argued, and the Circuit Court on January 12, 1942, overruled the motions made by the plaintiff, and sustained the motion made by the defendants to strike the complaint for mandamus, but gave leave for your petitioners to file a separate count in chancery within 10 days, and ruled that respondents answer within 10 days (Tr. 14).

COMPLAINT IN CHANCERY IN CIRCUIT COURT.

The separate count in chancery (Tr. 15 ff) was filed on January 20, 1942, pursuant to the order of the court; as a class suit with the Trust Company of Chicago, as Administrator, one named plaintiff, and Jason Paige, Executor of the Estate of Carrie E. Paige, deceased, as another named plaintiff; and all other persons in like situation with reference to condemnation judgments against the City of Chicago, as additional plaintiffs. To this additional count in chancery, the respondents filed a new motion to dismiss the entire suit (Tr. 56). That motion was briefed and argued, and the suit was dismissed by final order April 21, 1942 (Tr. 56), by the Circuit Court of Cook County.

The facts of the case appear in the pleadings, and such of said affidavits as this Court may determine to be material. No evidence was heard by the Circuit Court. All orders were entered by the motion judge. No written opinion has been filed, except that by Illinois Appellate Court.

On February 2, 1942, the plaintiffs filed a motion in writing in said Circuit Court, seeking relief *pendente lite* pursuant to the complaint in chancery and the prayers thereof. By order of that date the motion was entered and continued (Tr. 54). That motion was denied also by the final order of Circuit Court on April 21, 1942 (Tr. 56) mentioned above at page 5.

From that final order this appeal was taken direct to Supreme Court of Illinois by notice filed June 30, 1942 (Tr. 57). The record was filed in that court on appeal August 28, 1942. The order of transfer (Tr. 61) by that court to the Appellate Court for the first district of Illi-

nois, confirms that an effective appeal was taken in due time free from objection as to form and pursuant to statute.

THE BASIC ISSUE BEFORE ILLINOIS COURTS.

The local question in this case before the Supreme Court of Illinois was the construction of article 2, section 13 as to just compensation, and article 9, section 12 as to prior provision for payment before municipal debt incurred, and article 6, section 12 as to powers and duties of Circuit Courts over trusts in chancery, and related provisions of the Constitution of the State of Illinois; as applied to the trust for purchase money determined by condemnation proceedings; and as asserted by pleadings for plaintiffs in this suit.

These and federal constitutional questions were raised by the pleadings before the Circuit Court, were submitted to the trial judge, were ruled upon, and the adverse ruling was preserved for review in this record and duly presented to the Supreme Court of Illinois (Tr. 68).

By direct appeal to that Court your petitioners sought to obtain from that Court, the construction and application of specific provisions of the Constitution, to the situation where purchase money awards by condemnation judgment were not paid promptly; but where, after a substantial period of delay, there is paid at most a sum equal to the original amount of the award, without the accrual of interest which arises automatically by passage of time under the judgment act (Section 7 of Chapter 77) and other statutes (Section 2 of Chapter 74) of the State of Illinois, and under the just compensation provisions and said other provisions of the Constitution of Illinois (Tr. 34). Your petitioners say that said provi-

sions by statute and constitution have enlarged during the period of delay the amount of money secured by condemnation judgment lien and constitutional lien in favor of each property owner.

Jacobs v. *United States,* 290 U. S. 13 at 16.

People ex rel. 1111 *North LaSalle Building Corporation* v. *City of Chicago,* 316 Ill. App. 66.

People ex rel. Wanless v. *City of Chicago,* 378 Ill. 453 at 460.

That reserved constitutional issue in this record, stated by both law and chancery procedure, raised substantial constitutional questions on review before the Supreme Court of Illinois, some of which it had never passed upon. That basis for liquidation of condemnation judgment by this record was presented for the first time to the Supreme Court of Illinois, in the form of a class suit in chancery, asserting in this record that there can be no satisfaction under the constitutional and statutory provisions, until both the accrued interest first, and the original amount of the judgment thereafter, have been paid in full to property owner, for land taken by eminent domain proceedings:

City of East St. Louis v. *People,* 124 Ill. 655 at 663 ff.

Cohen v. *City of Chicago,* 377 Ill. 221 at 230.

Epling v. *Dickson,* 170 Ill. 329.

BASIC FACTS STATED BY THE PLEADINGS.

Paragraph (1) of complaint in chancery reads as follows:

> "The plaintiffs herein, were the owners of the real estate situated in the City of Chicago, condemned in part and damaged as to remainder of such parcel,

by proceedings for condemnation, and thereby taken from the plaintiffs by force against their wills, but subject to duties of City of Chicago to pay just compensation, as provided by sovereign constitutions and statutes, which were made for the protection of plaintiffs; all as hereinafter more fully stated" (Tr. 15).

Paragraph (2) names the defendants and their several official titles, and states:

"All of said persons respectively and their successors in office, are *ex officio* active express trustees, of powers, duties and funds, which are held by them for the plaintiffs, by reason of the facts hereinafter stated" (Tr. 16).

Paragraph (4) asserts that designated portions of the Constitutions of the State of Illinois and of the United States, are the basic rights giving rise to the duties of the defendants as trustees for the plaintiffs (Tr. 17).

Paragraph (5) relies upon specific portions of the Act concerning local improvements and other portions of the statutes as confirming fiduciary powers with which the defendants were and are vested for the benefit of plaintiffs (Tr. 17).

Paragraph (6) recites that the defendants being so vested with basic constitutional and statutory powers in trust, voluntarily undertook to exercise the same by the condemnation proceedings designated in this suit (Tr. 18).

Paragraphs (7) and (8) are as follows:

"(7) Many other like proceedings, and court judgments in condemnation, under Local Improvement Act or Eminent Domain Act, in favor of groups of persons, which include all other plaintiffs, and against defendant City of Chicago, for local improvement and other purposes, were entered at the suit of the

defendants in the County Court, the Circuit Court and the Superior Court of Cook County, after July first, 1897, and before the filing of this complaint, as shown by the records of said courts, and further shown by a memorandum thereof, to be filed in this cause as an integral part of this complaint, pursuant to prayer (i) of this complaint. All of said proceedings are entered also upon the dockets and files of the City of Chicago and are well known to the defendants" (Tr. 19).

"(8) Defendants by their own voluntary acts, elected to have said courts enter the judgments of condemnation, which confirm awards of money to the plaintiffs, and against defendant City of Chicago personally and individually, in each and all of the suits for condemnation herein mentioned. Each judgment is personal and individual against the City of Chicago. None of said judgments was ever reversed or modified. Said judgments became and remain final and unconditional, as required by the constitution and as provided by Statute. The amount of each judgment as entered, became instantly a capital liability and obligation of said trust, under the constitution as hereinafter stated. Thereby said fiduciary and trust relationship became irrevocable, until payment to each plaintiff herein shall be fully made, with interest, costs and counsel fees as hereinafter stated" (Tr. 20).

Paragraph (9) says that upon the entry of the judgments in condemnation, plaintiffs became vested with unconditional rights to receive the compensation awarded, and

"Thereby the full faith and credit of the City of Chicago, was pledged and assigned in trust irrevocably, to secure and assure such payment, to each of present plaintiffs" (Tr. 21).

Paragraph (10) reads as follows:

"These vested rights of the City of Chicago and the present plaintiffs, are reciprocal, correlative, and

> inseparable. From and after the entry of judgment in condemnation, the City of Chicago thereby was adjudged liable to perform all fiduciary duties, which it had accepted and assumed as herein stated, and was adjudged to hold in its control and possession, the just compensation and interest accruing thereon, in an active express trust for the sole beneficial use of each plaintiff respectively, until each shall be fully paid as herein demanded" (Tr. 21).

Paragraph (11) recites further steps in the condemnation proceedings, and the completion of all of the improvements (Tr. 22).

Paragraph (12) states the account between the defendants, and Trust Company of Chicago as Administrator of the estate of Elizabeth Palmer Smith, one of the plaintiffs. This account shows at foot of the accounting:

> "Net balance of principal of judgment unpaid, Two Thousand Eight Hundred Nineteen and 57/100 ($2,819.57) Dollars, remaining due October 10, 1927 on the judgment."

and interest thereon to be computed (Tr. 22).

Paragraph (13) shows a like accounting against the defendants, and in favor of the Executor of the Estate of Carrie E. Paige, deceased, one of the plaintiffs:

> "Net balance of principal unpaid, Four Thousand Four and 62/100 ($4,004.62) Dollars, remaining due February 1, 1927 on the judgment."

and interest thereon to be computed (Tr. 23).

Paragraph (14) recites similar accountings for substantial sums of monies due from the defendants to each of the plaintiffs by reason of unsatisfied condemnation judgments (Tr. 24).

Paragraph (15) states that all these monies due to the plaintiffs from the defendants, are due as part of the trusts established by the constitutions. It reads as follows:

"Trust to Pay Plaintiffs Pursuant to Constitution.

"Said City of Chicago and said officials *ex officio* as active express trustees, at all times herein concerned were so seized, vested and possessed of said enabling powers, and had accepted and assumed complementary duties, under said bills of rights, constitution and statutes in trust, that the named plaintiffs and all other persons in like situation, whose land was taken in part and damaged as to remainder of parcels, for said Local Improvements, shall be paid pursuant to enabling statutes, and pursuant to said judgments of condemnation, and pursuant to all statutes now in force concerning local improvements, and pursuant to the duties of active express trustees, according to the course of equity by the common law, which is preserved intact by Section 12 of Article 6 of the Constitution of the State of Illinois, and confirmed by many decisions of the Supreme Court of Illinois" (Tr. 24).

Paragraph (16) recites that defendants as trustees, in partial exercise of their trust duties, created the special assessment trust fund, which is described in the mandamus petition filed October 23, 1933, in this cause (Tr. 24 and 4).

(The report of the comptroller of the City of Chicago for the year 1944, which is the most recent published report, shows at page 83, "Assessment accounts, December 31, 1944, excess of contingent assets over contingent liabilities $17,083,788.14.")

Paragraph (17) recites that under section 22-13 of the Cities and Villages Act, the respondents have in charge an additional trust fund therein described, which is applicable to payment of balances due the plaintiff on their judgments (Tr. 25).

Paragraph (18) states that by section 22-14 of the Cities and Villages Act, interest accrued on judgments

shall be paid when any principal is paid, and recites that Section 7, Chapter 77 (which is the judgment act) provides for interest at the rate of six per cent per annum, from the date of the recovery of any judgment "until the same is paid" (Tr. 26).

Paragraph (18) continues by declaring that the effect of the constitutions and statutes is to deprive the respondents of any discretion as to payment of interest; that it was and is the peremptory duty of the defendants to pay all interest that has accrued, before any sum could be credited on the principal of any condemnation judgment (Tr. 26).

Paragraph (19) recites the rulings made by Supreme Court of Illinois, and asserts that any failure to pay and credit interest before principal, would be a departure from the powers of the defendants, and wrongful departure from their trust duties (Tr. 27).

Paragraph (20) asserts wilful delays by the defendants for many years in making the payments, and asserts the inadequacy of the legal remedies as an important reason for this class suit in equity (Tr. 28).

Paragraph (21) asserts that by reason of the constitutional provisions, and the facts stated in the complaint, plaintiffs have a first and prior lien, as of the dates of the judgments, upon all available funds and property of the City of Chicago (Tr. 29).

Paragraph (22) reads as follows:

> "Also at all times herein concerned, the defendants by undertaking such trust relation as active express trustees, had accepted and assumed an affirmative duty to act in good faith, to make a faithful disclosure, frequent account, full discovery and accurate report to the plaintiffs, with reference to all duties

and obligations herein mentioned, of the City of Chicago and said official *ex officio*, as express trustees, including the prompt payment of interest as a part of just compensation, and with reference to what were and are, all the funds and property available to pay said principal, interest and just compensation to the plaintiffs" (Tr. 29).

Paragraph (23) shows in detail, the violations by defendants of their duties as such trustees, and their wilful attempts to defeat the vested and constitutional rights of the plaintiffs (Tr. 30).

Paragraph (24) sets forth acts of duress and other misconduct by the plaintiffs (Tr. 30).

Paragraph (25) shows that these acts and duress were so severe as to amount to fraud on the plaintiffs, and against their financial rights (Tr. 31).

Paragraph (26) shows that the releases, deeds and other vouchers, which the defendants coerced from some of the plaintiffs, are void and fraudulent and to be disregarded by this court of equity (Tr. 32).

Paragraph (27) refers to Section 22-15 to 20 of the Cities and Villages Act, as establishing additional $12,000,000 fund applicable to the payment of monies due to the plaintiffs (Tr. 32).

Paragraph (28) recites in detail the constitutional provisions which are relied upon by paragraph (4), and concludes as follows:

"The language of the constitution is peremptory, that the municipal authorities shall, before or at the time of incurring condemnation indebtedness, provide for the collection of a direct annual tax, sufficient to pay the interest and principal, of all just compensation indebtedness with interest and costs. That duty is paramount to all other duties. The municipal body

is not authorized to apply to such purpose, only the money that may remain after paying other expenses, or after discharge of other appropriations. The City is commanded to liquidate entirely all judgments for just compensation, ahead of and prior to payment of any other judgments, or any other obligations or expenses whatsoever. All of said provisions of the Constitution of Illinois are self-executing, and are written into all proceedings and statutes affecting local improvements. To provide and pay the money is an irrevocable duty, which has been accepted and assumed by the defendants voluntarily. That constitutional duty is a continuing one, until full performance shall occur" (Tr. 33).

Paragraphs 29, 30, 31 and 32 set forth the history of this suit prior to the filing of count in chancery (Tr. 35-37).

Paragraph (33) shows that the failure by the defendants, as active express trustees, to pay the plaintiffs, is long continued and wilful, and renders the City of Chicago personally liable to pay the plaintiffs (Tr. 37).

Paragraphs 34, 35, 36, 37, 38, 39 and 40 recite further details of wrongful administration of the trusts by the defendants (Tr. 38-42).

Paragraph (41) shows that the defendants are presumed as matter of law, to have in hand the funds and monies sufficient to liquidate the claims of the defendants (Tr. 42).

Paragraphs (42) and (43) state in detail that this is a proper class suit. Those paragraphs read as follows:

"By reason of events hereinabove stated, it has become necessary, and the plaintiffs have instituted and are maintaining this suit, on behalf of themselves and on behalf of all other property owners herein mentioned, and on behalf of all property owners who

have condemnation judgments as above mentioned, in any part unpaid. All such persons are made parties plaintiff as a class by description. The objects of the suit and the questions arising, are of common and general interest to all concerned. Said trust beneficiaries are numerous and constitute hundreds of former property owners, who are condemnation money judgment creditors, there being scores of properties condemned and hundreds of owners. They constitute a class so numerous as to make it impracticable, to bring them all by name at this time before this court. Their names and residences cannot be ascertained without great difficulty and delay. In some condemnation orders so obtained by the defendants, the plaintiffs were not named, but were described as 'owners.' The named plaintiffs fairly represent the interests of all herein. Wherefore the active plaintiffs are suing in behalf of all such persons who are plaintiffs by description" (Tr. 42).

"The named plaintiffs, and all other said former owners of real estate, which has been damaged or taken by condemnation, who are made plaintiffs as a class by description, have a common like and pro rata interest, in the subject matter of this suit, and to the funds composed from collections by the City of Chicago, which are herein described and drawn into court. Plaintiffs' rights are not antagonistic or adverse to each other. All of the plaintiffs are beneficiaries of said active express trust powers, trust duties and trust funds. All plaintiffs are entitled to share therein pro rata, and in proportion as their interests herein shall appear. There exists a common right sought to be enforced in this cause. The named plaintiffs undertake to represent the rights, of all such property owners who now are beneficial owners, and to maintain and conduct, this suit as a representative class suit, for the benefit of themselves and all said former owners of real estate condemned. The named plaintiffs invite all members of the class to appear in this action, and to make contribution by pro rata share, toward the costs and expenses of the same" (Tr. 43).

Paragraphs (49) and (50) (Tr. 47), are as follows:

> "The active express duties of defendants, to levy, assemble and distribute to the plaintiffs said trust funds, are so primary and so firmly established by said sections of the constitutions, that all power is withheld from the legislature, to make any statute of limitation applicable, to any facts or transactions mentioned in this complaint. In the alternative the plaintiffs say, that no facts or circumstances exist or have occurred, which are sufficient to start the running, of any statute of limitations, which the defendants might claim to be applicable to this suit."
>
> "Any refusal by this court to give relief, to the plaintiffs as herein demanded and prayed, would be departure from the law of the land, and a denial of property and procedural rights, which are vested in the plaintiffs as stated in this complaint, and would be a denial to each of them, of due process under the constitutions and the decisions, which are hereinabove asserted for the protection of the plaintiffs."

Prayers for Relief in Complaint in Chancery.

Paragraph (51) contains prayers for relief (Tr. 48ff.) including discovery, accounting and orders for payment of the sums found due to the plaintiffs, with appropriate attorneys' fees and costs, to be paid to the plaintiffs out of the funds mentioned in the complaint or to be provided in response thereto, and pursuant to the provisions of the constitutions (Tr. 48-53).

The record also includes a separate count making the same claim by petition for writ of mandamus. Of that pleading both the Circuit Court of Cook County (Tr. 34), and the Supreme Court of Illinois (Article 6, Section 2) have original jurisdiction by direct provision of the Constitution of Illinois.

The Theory of Appellants Before Courts of Illinois.

Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore,* 212 Ill. App. 550 at 553 and 554 and cases there cited.

The Supreme Court of Illinois has said in *Feldman* v. *City of Chicago,* 363 Ill. 247, 249 (assumpsit upon condemnation judgment):

> "The claim here was for a sum certain, depending only upon computation., Demand for interest was made at the time the judgment was paid. The amount of compensation was fixed by the judgment and the rate of interest was fixed by the Interest Act. No dispute could arise between the city and the property owner as to the amount to be paid, after the judgment became final and unconditional."

By section 32 of the Local Improvement Act of Illinois (Chapter 24:84-32), the duty to pay the purchase price is unconditional from and after date when the judgment becomes final. Thereafter "no dispute could arise be-

tween the city and the property owners as to the amount to be paid." Petitioners say that by said provisions of the constitution, and by Section 1 of the Eminent Domain Act (Chapter 47), and by Section 30 of said Local Improvement Act, the taking does not become lawful and sufficient until payment has been fully made. It follows that all usual remedies by mandamus and in chancery are available to the property owner, as of course until his selling price with accruing interest, as determined by the judgment order and the Constitutions has been fully paid.

The Main Questions Presented By This Petition.

Whether obligatory jurisdiction may be evaded and renounced by Illinois Courts, under our constitutional system of government.

Constitution of United States, Art VI, paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whether the Illinois Courts by renouncing obligatory jurisdiction with which they are vested by the Constitutions, can thereby evade ruling upon the record as to constitutional matters presented to them by your petitioners, so that thereby your petitioners have been denied their property and freedom under the bills of rights.

Foregoing primary questions may be restated as follows:

Whether the Supreme Court of Illinois has choice to ignore and violate the bills of rights of the Constitutions

of the United States and of Illinois, by its failure to provide clear and explicit rules governing proceedings before that court, particularly as to the manner of stating jurisdiction where constitutional questions are involved. Under the prevailing practice, that court has assumed the position that in ruling upon a case before it, it has power and discretion to decide or not to decide whether a constitutional question is involved. Litigants are thus deprived of their rights in that that court claims it may, (as in this case) merely transfer the case to the Appellate Court of Illinois without any opinion. Such practice results in a practical blockade of review by the United States Supreme Court, from such an order.

(Rules of Supreme Court of Illinois are printed in full form by Smith Hurd Illinois Annotated Statutes, Chapter 110, Sections 259.1 to 259.71.)

Whether the Supreme Court of Illinois may debase the bill of rights and other provisions of the Constitution of Illinois into a bill of their discretions, by their varying manner of administration of Sections 75 and 86 of Illinois Civil Practice Act. Those sections read in part as follows:

> "Appeals *shall* be taken directly to the Supreme Court in *all cases in which* a franchise or freehold or the validity of a statute or *a construction of the constitution is involved.*" Section 75.
>
> "Where an appeal is taken to either the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to such court, it shall be the duty of such court to direct the clerk to transmit the transcript and all files therein with the order of transfer to the clerk of the proper court. On the receipt of such record the clerk shall at once file the same and the case shall then proceed as if the same had been taken there from the inferior court." Section 86.

In some transfers to Appellate Court, opinions are written, (a recent example is *Rittenberg* v. *Murmingham*, 381 Ill. 267), in others there is only the order, as in this record (R. 78). The absence of opinion attempts to blockade review by this court, and leaves indefinite what proceedings are intended to be conducted before the Appellate Court.

Whether the Circuit Court of Cook County and the Supreme Court of Illinois may disregard and deny to petitioners equal protection of the law, which had been announced and settled by at least five decisions of the Supreme Court of Illinois, prior to the time the suit at Bar was prepared and demand was made on October 20, 1933 (Tr. 77). Those decisions require reversal at Bar.

Whether the Supreme Court of Illinois may deny to petitioners equal protection of the law, by its cryptic order and its failure to prepare and file an opinion, contrary to what it does in most cases where an order of transfer is made to the Appellate Court; thereby making difficult by adverse judicial administration, the path of your petitioners to the Supreme Court of the United States.

Whether the Supreme Court of Illinois may deny to your petitioners equal protection of the law, by refusing any writ for enforcement of the judgment against a municipal body except by arbitrary discretion of the Supreme Court of Illinois (Tr. 74-76), whereas as against all other judgment defendants, writs of execution upon judgments issue in all courts of Illinois as of course, from the office of Clerk in every court. Compare current ruling on *scire facias* after judgment: *Bank of Edwardsville* v. *Raffaele*, 381 Ill. 486 at 487.

Whether the Courts of Illinois may enforce provisions of the Constitution of Illinois with reference to recovery

by some litigants for property taken by condemnation (*People ex rel. Louis Markgraff, et al., Appellees* v. *Rosenfield Director, Appellant,* 383 Ill. 468; *People* v. *Kelly,* 361 Ill. 54 at 59, 60) and arbitrarily refuse like relief to your petitioners (Tr. 67-76).

Whether the Supreme Court of Illinois, by any and all said action adverse to petitioners, may deny to them due process of law contrary to Section I, Amendment 14 to the Constitution of the United States.

Where as here the appeal is taken upon constitutional grounds, there exists no rule by the Supreme Court of Illinois as to manner for stating its jurisdiction. Standing rules of that court do not require specific mention in the briefs before that court, as to the matter of jurisdiction.

In the case at Bar the respondents made no motion in the Illinois Courts as to jurisdiction on this appeal, but filed a printed brief upon the merits of the case. There was no issue as to jurisdiction before the Supreme Court of Illinois. That court made no special ruling for your petitioners to show cause in that court upon the matter of jurisdiction. The order does not say that that court acted upon its own motion. The order of transfer has no basis in the record. The order is merely arbitrary. That court of record proceeded orally. The failure by the Supreme Court of Illinois to provide clearly by rules governing proceedings before that court, as to manner of stating jurisdiction where constitutional questions are involved, results in uncertainty which that court uses to hear and decide, or not to hear or decide, a case presented, merely as a matter of grace and arbitrary discretion (Tr. 61).

While the Supreme Court of Illinois in recent years has argued against constitutional questions coming to that court, its remarks appear by opinions in many re-

ports, nowhere stated in unit form, and never adhered to with any consistency or continuity by that court. The only clear principle which that court has stated is that jurisdiction vests in that court where the question is "so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." *Winkelmann* v. *Winkelmann,* 345 Ill. 566 at 568. The pleadings do that in the record at Bar. The briefs in the Supreme Court of Illinois carefully discussed those same federal and constitutional matters. The same was true before said Appellate Court of Illinois. The Illinois Courts by this record have evaded, and by-passed the constitutional questions that were presented to them.

Summation of This Petition.

Under the federal practice since 1938, there is one form of civil action in the District Courts. As procedure all former separation and distinction between actions at law and suits in equity are abolished. The prayer may ask for all kinds of relief upon the facts set forth. Reference is made to Rules 2 and 8 of Federal Civil Procedure. Reference is made also to 32 A. B. A. Journal, July 1946 at page 408.

Directly the contrary remains the established Illinois procedure and practice by Illinois Statute and the court decisions. The Common Law and equity distinctions continue as to procedure, practice and also as to substantive right. The substantive equitable right can be sought in Illinois only by equitable procedure and practice on the equity docket of the court. Reference is made to Illinois Civil Practice Act (Chapter 10), Section 31, 33(2), and 44: and *Illinois Minerals Company* v. *Miller,* 327 Ill. App. 596. (See also Court Rules 11 and 12: Ill. Rev. Stat., Chap. 110 at 259:11 and 259:12.)

That basic separation and distinction between law action and equity suit has been consistently enforced and demanded by all courts in Illinois to the present date. Reference is made to *Illinois Minerals Company* v. *Miller,* 327 Ill. App. 596; 65 N. E. 2d 44 at 47; and the citations there mentioned and discussed. Many cases have been dismissed for failure of litigants by pleading and practice to perform and execute the distinction.

The one and only exception made thereto in Illinois, is the decision by the Illinois Courts in tne case at bar. On this record they have denied due process of law by abolishing the distinction and citing the cases of law pleading and law ruling as though they could govern in equity. The action in this record by the Illinois Courts, effectively abolished the statutes and court rules, and the constitutional lien asserted by petitioners, but only *ad hoc* as to this one case at bar. Such judicial action is an arbitrary frustration of law and justice, as shown in detail by this petition. Cases in equity were and are cited by petitioners, decided in favor of recovery years before this suit was brought, involving identical questions of liens, time elements, condemnation money unpaid, judgments therefor, and interest and cost accruals for delay in payment (Tr. 77). Those cases are ignored and brushed aside arbitrarily by the Illinois Courts.

The same Judge sitting in the same division of the same Appellate Court whose Opinion in the case at Bar is now brought for review in this Court, on the same date (November 7, 1945) with rehearing denied on the same date (November 26, 1945), filed an Opinion in the case of *Thomas* v. *Bourdes,* 63 N. E. (2d) 621, 327 Ill. App. 197, in which said Judge and Appellate Court stated the law of Illinois on page 623 as follows:

> "* * * In *Becker* v. *Billings,* 304 Ill. 190, 199, 136 N. E. 581, 585, the court said:

"'It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, he can be called to an account in regard to that trust, but when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose.'"

"This doctrine also applies to cases of express trust. (*Simpson* v. *Manson*, 345 Ill. 543, 554, 178 N. E. 250.)"

Likewise, in *Pease* v. *Kendall*, 63 N. E. 2d 2 at 4, 391 Ill. 193 at 197:

"Courts of equity have paramount jurisdiction in the settlement of trust estates and may even control courts of law in their action in that regard. *Grattan* v. *Grattan*, 18 Ill. 167, 65 Am. Dec. 726; 1 Story's Eq. Juris. chap. 9; Williams on Executors, pp. 1239 and 1240. It is evident from the pleadings that a dispute had arisen as to who is entitled to the property belonging to the estates of John H. and Edwin A. Pease. It is also clear from the facts shown that a necessity existed to safeguard and preserve the assets of the estate of John H. Pease and prevent waste until his will and that of his son could be construed. A court of equity has paramount jurisdiction in such a situation. *Curtiss* v. *Brown*, 29 Ill. 201."

And finally we quote from *Town of Cicero* v. *Green*, 211 Ill. 241, 71 N. E. 884 at 886:

"Appellees also contend that the interest on the contractor's vouchers, amounting to $9,045.80, cannot be considered part of the cost of the improvement, and that there is no deficiency unless it is based upon that item. The stipulation was that the entire amount of the original assessment was collected, and that it amounted to $56,122.83. Section 55 of the act provided for dividing the assessment into installments,

the first of which should not exceed 25 per cent of the assessment, and the remaining portion to be divided into four equal installments, bearing interest at the rate of 6 per cent per annum. 1 Starr & C. Ann. St. p. 781. Section 63 provided that the vouchers should bear the same rate of interest as the installments, and it was intended that the interest on the installments and the interest on the vouchers should equal each other. The total amount collected, according to the stipulation, necessarily included the interest, and, *where payments are deferred, the interest is as much a part of the cost of the improvement as the principal.* The contractor is as much entitled to the interest on the voucher as he is to the principal. *People* v. *City of Chicago,* 152 Ill. 546, 38 N. E. 744. *In case of a partial payment upon an interest-bearing obligation exceeding the interest, the payment is first applied to satisfy interest due, and the balance on the principal. The cost of the improvement is the total amount paid for it, and whatever remains unpaid is a deficiency.*"

This statement of law as to *inclusion of interest as part of the fund which is security,* for a contractor who takes bonds as payment for his work upon a public improvement, is all the more true as to an owner whose real estate is taken from him by court proceedings and a judgment. The present suit seeks a like accounting and an equal security and payment of judgments entered as compensation for real property taken for a public improvement. Due process and just compensation so require under State and National Constitutions, as set forth throughout this record.

Futhermore without regard to mere procedural requirements, this suit is brought as a cause of action for the enforcement of a trust duty and obligation, voluntarily undertaken and assumed and carried on by the City of Chicago. Against such trust obligation in equity, there ex-

ists in Illinois, no statute of limitations. *C. & E. I. Ry. Co.* v. *Hay,* 119 Ill. 497 at 502.

This record is a suit in equity for trust accounting, entered upon the equity docket of the Circuit Court, asserting the wrongful violations by the defendants of substantive rights of petitioners in equity, and seeking equitable relief. All this complaint is clear and specific in this record. The answers made were withdrawn voluntarily from the record, by motion of the defendants and the consent of the Circuit Court (Tr. 8).

Prayer for Relief on This Petition.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Supreme and Appellate Courts of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitoners pray the allowance of a writ of certiorari to the Appellate Court of Illinois First District to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by said Courts of Illinois may be reversed, and for such relief as this Court may direct.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Petitioners.

HORACE RUSSELL,
LAWRENCE C. MILLS,
WILLIAM D. WOOLESEN,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 394

THE TRUST COMPANY OF CHICAGO, Administrator of Estate of Elizabeth Palmer Smith, deceased, and JASON PAIGE, as Executor of Estate of Carrie E. Paige, deceased and others, Petitioners, vs. **CITY OF CHICAGO, and others,** Respondents.	Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred. Honorable John Prystalski, Chancellor. Mandamus and Class Suit in Equity to Administer a Trust.

REPLY TO ANSWER BY RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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Petitioners,

vs.

CITY OF CHICAGO, and others,

Respondents.

Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred.

Honorable
John Prystalski,
Chancellor.

Mandamus and Class Suit in Equity to Administer a Trust.

REPLY TO ANSWER BY RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

The statement by respondents in this Court, and before the State Courts, is one of confession. They admit the correctness and truth of our complaint and our petition. In this Court and in the State Courts, they have sought an avoidance by ignoring the nature and effect of the pleadings in the record and by contending the the Courts must decide in favor of respondents, without any regard for the language of the pleadings in equity and the petition here by the plaintiffs.

Respondents Wish to Denature This Equity Suit. They Advocate Judicial Repeal of the Constitution.

The plaintiffs raised constitutional issues by the complaint in the trial court (Tr. 33-40), and reasserted the same by the petition for rehearing in the Appellate Court (Tr. 77 ff), by all the briefs that were filed in each of the Illinois Courts, and by our petition now before this Court, (Page 4 ff and 25-32). The respondents and the Courts of Illinois deny to us due process of law and equal protection of law by their words of bold assertion which seek to denature our suit from being one in chancery into becoming a suit at law, basically different in its nature.

When the respondents by their answer in this Court contend that the action by Illinois Courts was merely erroneous, they ignore the record to which we have just now made reference, by which the plaintiffs throughout this record have asserted as their grievance the denial of constitutional rights in equity, and the confiscation of property without equal application of law and contrary to due process of law. At Page 4 ff and 25 to 32 of our petition in this Court, our constitutional grievances are restated.

The attempt by the answer to erase this continuous record of constitutional grievance by merely stating that it does not exist, constitutes failure on the part of the respondents to meet the issues which are presented by petitioners. Respondents do not overcome our record and our petition by stating to this Court that respondents are blind to that which they do not wish to see, and do not wish to acknowledge. Respondents seek to supplant our case by assuming one of their own choosing.

Defendants' answer asserts that the petitioners were given their day in Court. But petitioners have shown by this record they did *not* receive any day in Court, *on the case in chancery made by their pleadings.* Under Illinois Laws and its Constitution, petitioners were entitled to a hearing upon their property rights in equity before the Courts of Illinois, upon their pleadings in chancery. This right has been ignored and refused, by the action of those Courts, as we have shown by the record.

This Court has many times stopped the destruction of citizen rights, attempted by one or another form of either direct or indirect evasion. In the case at bar, we have shown an attempt to destroy our property rights by circumvention. Respondents persuaded the courts of Illinois to suppose and to decide a case at law, when the facts set forth by the complaint establish a case of historic chancery, which is entitled to claim and to receive from this court the protection of the fourteenth amendment to the Constitution of the United States.

The basic distinction and separate history of law or jus and chancery or equitas, is fundamental and elementary in the Roman Law and in the Common Law. Until recently these two streams of jural protection for the citizen were administered by entirely different and separate Courts. The jural separateness and jural permanence of these two streams of right and procedure to which every citizen may have access is embedded in the Constitution of Illinois, Article VI, Section 12. (Tr. 34 and 78.)

But the respondents and the Courts of Illinois in this case at Bar would erase entirely so far as petitioners are concerned, both the right and procedure of chancery or equity.

The answer by respondents adopts the theory of the *dissenting* Opinion in the case of *Bell* v. *Hood,* which is discussed at Page 8 and following of our petition. The respondents contend that the Courts of Illinois may disregard the pleadings that are before them, and may of their own will set up and decide a different sort of case that could be stated and was stated in other records by other litigants (Chapralis, Cohen, Blakeslee), using another assembly of facts and theories of law, that historically and fundamentally have consequences that are different from the trust and equity theory and the facts pertaining thereto, upon which this record was conceived and carried out.

The cases cited by respondents were at law on law pleadings. They are shown to be inapplicable by our petition. (Page 7: Tr. 77.) The respondents contend by their answer, that the Courts of Illinois may adopt and decide this case upon the assertions made by respondents, which are merely oral so far as this record is concerned. The answer by respondents makes no page reference at all to any part of the record. They rely upon oral theory not stated nor founded upon this record. The Cohen, Blakeslee and Chapralis cases, were not in chancery and do not present any trust theory nor do they seek any equitable remedy.

The motion by respondents as defendants in the trial court (Tr. 55), admitted entirely the truth of all facts stated by our complaint in equity (Tr. 15-53). Especially we mention that the motion admits Paragraph 49 (Tr. 47) reading as follows:

"*Statutes of Limitations do not apply.*

"(49) The active express duties of defendants, to levy, assemble and distribute to the plaintiffs said

trust funds, are so primary and so firmly established by said sections of the constitutions, that all power is withheld from the legislature, to make any statute of limitation applicable, to any facts or transactions mentioned in this complaint. In the alternative the plaintiffs say, that no facts or circumstances exist or have occurred, which are sufficient to start the running of any statute of limitation, which the defendants might claim to be applicable to this suit."

The answer by respondents in this court and their argument in all Illinois Courts, and all action by Illinois Courts, each and all ignore completely and proceed directly contrary to that admission by the respondents by this record.

The right of petitioners is not merely procedural; but is a substantive right of property under the Constitution. From *Potter* v. *Couch*, 141 U. S. 296 at 320, we quote as follows:

"This Statute, as has been adjudged by this court, establishes a rule of property, and not of procedure only; and applies to all cases where the creditor, or his representative, is obliged, by the nature of the interest sought to be reached, to resort to a court of equity for relief, as he must do in all cases where the legal title is in trustees, for the purpose of serving the requirements of an active trust, and where, consequently, the creditor has no lien, and can acquire none at law, but obtains one only by filing a bill in equity for that purpose. The words 'in trust,' as used in the exception or proviso, cannot have a more restricted meaning than the same words in the enacting clause." Citing cases: see our petition Page 4 ff., and Tr. 75 ff., 33 ff.

Harmon v. *City of Peoria*, 373 Ill. 594; 27 N. E. 2d 525 at 529:

"Furthermore, this court appears to be committed to the doctrine that mere acquiescence, irrespective of

the period of time, cannot legalize clear usurpation of power which offends against the basic law. *Forbes* v. *Hubbard,* 348 Ill. 166; 180 N. E. 767."

Our Courts in the case of *Maloney* v. *City of DesPlaines,* 303 Ill. App. 233, and *Markman* v. *Calumet City,* 297 Ill. App. 531, *Bankers Life Company* v. *Chicago Park District,* 318 Ill. App. 214, *Roberts* v. *Village of Lyons,* 307 Ill. App. 36, and many other cases, has ruled that statutes of limitation in these special assessment matters cannot be applied, until after the municipality has definitely shown that it has funds available and offers payment. The contrary fact of refusal to make payment (Tr. 6), is established by this record. The City of Chicago does not so proceed. It merely asserts there is some statute of limitation. Defendants fail to specify any statute. (Tr. Pages 8, 55.) The facts are not shown by the defense and do not exist, which are necessary to start the running of any Statute of Limitation. *White* v. *Sehrman,* 168 Ill. 589; 48 N. E. 128 at 132. Notice of disclaimer and repudiation of trust are indispensable to start running of time for limitation.

Epling v. *Dickson* (Page 14 of our petition) was a *chancery suit like the record at bar.* It was confirmed and approved by the opinon in *Mansure* v. *City of Chicago,* 372 Ill. 156. This record relied upon the *Epling* decision.

Likewise *Cordova* v. *Hood,* 84 U. S. 1 at 5:

"That the vendor by such a deed, had a lien for the unpaid purchase money, as against the vendee and those holding under him with notice, unless the lien was waived, is *the recognized doctrine of English chancery,* and Texas is one of the states in which the doctrine has been adopted. *Osborn* v. *Cummings,* 4 Tex. 13; *Neel* v. *Prickett,* 12 Tex. 138; *Briscoe* v. *Bronaugh,* 1 Tex. 326. It is a general principle that a vendor of land, though he has made an absolute

conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase money, unless there has been an express or an implied waiver of it. And this lien will be enforced in equity against the vendee and all persons holding under him, except bona fide purchasers, without notice. *Mackreth* v. *Symmons*, 15 Ves. 329."

Pickrel v. *Doubet*, 239 Ill. App. 553 at 556 fully confirms the claim in this record for an enforcement in chancery of vendor's lien owned by the plaintiffs.

No record pleading would have value any more in any case, if this Court sustains the acts of jural substitutions done here by respondents and the Illinois Courts, and sustains the theory of the answer made here by the respondents.

The petition for certiorari should be allowed and proceedings should follow as prayed by our petition.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Petitioners.

HORACE RUSSELL,
LAWRENCE C. MILLS,
WILLIAM D. WOLLESEN,
Of Counsel.

FILE COPY

No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

THE TRUST COMPANY OF CHICAGO, Administrator of Estate of Elizabeth Palmer Smith, Deceased, and JASON PAIGE, as Executor of Estate of Carrie E. Paige, deceased and others, Petitioners, vs. CITY OF CHICAGO, and others, Respondents.	Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred. Honorable John Prystalski, Chancellor. Mandamus and Class Suit in Equity to Administer a Trust.

SUPPLEMENTAL REPLY TO ANSWER BY RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

WEIGHTSTILL WOODS,
Attorney for Petitioners.

HORACE RUSSELL,
LAWRENCE C. MILLS,
WILLIAM D. WOLLESEN,
Of Counsel.

Scheffer Printing Company, Del. 7171

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vs.	There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred.
CITY OF CHICAGO, and others, Respondents.	Honorable John Prystalski, Chancellor.
	Mandamus and Class Suit in Equity to Administer a Trust.

SUPPLEMENTAL REPLY TO ANSWER BY RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Some days after the Reply by Petitioners had been filed in this Court, and on September 19, 1946, the Supreme Court of the State of Illinois, filed an Opinion prepared by Chief Justice Gunn, in case of *Woodruff, Appellant* v. *The City of Chicago, Appellee,* Docket No. 29375. The opinion was unanimous and without dissent. From that Opinion we quote as follows:

"* * * Appellee (City of Chicago) contends there never was an abandonment, and under this theory

> no cause of action has ever accrued. And likewise, the contention is made, if abandonment has been established, that it occurred more than five years ago. It is unnecessary to discuss these inconsistent positions for the simple reason that funds received by the city from a special assessment proceeding are considered trust funds, (*Conway* v. *City of Chicago,* 237 Ill. 128; *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330,) and *the statute of limitations cannot be urged against an accounting for trust funds. Barnes* v. *Barnes,* 282 Ill. 593."

This language is directly in point and fully sustains the position of Petitioners in this case. It is the latest expression as to equitable right, in the current language of the Supreme Court of the State of Illinois. Their Opinion is given in relation to two improvements in the City of Chicago, wherein both condemnation and special assessment procedures were involved substantially as they are in the record now before this Court.

In this *Woodruff* case the Appellate Court denied relief just as it has done to Petitioners in this record now before this Court. In the *Woodruff* case the Supreme Court of Illinois granted leave to appeal to that Court exactly contrary to what they did to your Petitioners on this similar record. This demonstrates an undeniable inequality, a wilful discrimination, and contrary ruling upon a like situation, in violation of the Fourteenth Amendment to the Constitution of the United States. This contrast constitutes a current demonstration that the ruling against your Petitioners was merely arbitrary and wholly lacking in any due process of law by the Courts of Illinois.

Furthermore the pleading in this *Woodruff* case is stated by said Opinion of the Supreme Court of Illinois to be

> "An action at law was instituted by Joseph B. Woodruff against the City of Chicago to recover two special assessments paid by him to the City of Chicago in the years 1927 and 1928."

In other words, where an accounting is involved with relation to condemnation and special assessment monies, the Supreme Court of Illinois now says that it makes no difference whether the suit be filed at law or in chancery. They now say and they now confirm in this *Woodruff* case, that because the monies involved are trust funds, the form of the action is not material and recovery will be granted to the plaintiff under any and every procedure.

This means that the ruling by the Appellate Court against Petitioners not only was wrong, but was a clear violation of the Constitution, not only because they refuse to consider chancery procedure for an accounting with relation to trusts for money, but that they were wrong and contrary to the Constitution, in relying upon any decisions with relation to statute of limitations, whenever either at law or in chancery *the plaintiff relies upon a trust and an accounting.*

Petitioners submit that their record from the beginning is bottomed upon the trust theory and the trust accounting, and that they have established by this record a complete denial of their rights under the Fourteenth Amendment to the Constitution of the United States.

Your Petitioners renew the prayers of their Petition.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Petitioners.

HORACE RUSSELL,
LAWRENCE C. MILLS,
WILLIAM D. WOLLESEN,
Of Counsel.

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SUMMARY OF ARGUMENT.

I. In essence the petition for certiorari charges that the judgments of the State courts are erroneous. The Fourteenth Amendment to the Federal Constitution offers no protection against erroneous judicial action even if the charge were well grounded 1-4

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IN THE

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No. 394

THE TRUST COMPANY OF CHICAGO, Administrator of Estate of Elizabeth Palmer Smith, deceased and JASON PAIGE, as Executor of Estate of Carrie E. Paige, deceased, and others,

Petitioners,

vs.

CITY OF CHICAGO, and others,

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Petition for writ of certiorari to Appellate Court of Illinois, First District. There heard on Appeal from Circuit Court of Cook County to Supreme Court of Illinois, to November Term, 1942 and transferred.

Honorable John Prystalski, Chancellor.

Mandamus and Class Suit in Equity to administer a Trust.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondents, City of Chicago, *et al.*, oppose the petition for certiorari on the following grounds:

I.

IN ESSENCE THE PETITION FOR CERTIORARI CHARGES THAT THE JUDGMENTS OF THE STATE COURTS ARE ERRONEOUS. THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION OFFERS NO PROTECTION AGAINST ERRONEOUS JUDICIAL ACTION EVEN IF THE CHARGES WERE WELL GROUNDED.

The petition for certiorari is rather difficult to follow but a careful analysis of it discloses that essentially it charges that: (1) The trial court erred in dismissing the case summarily upon a motion to dismiss the complaint because it was not filed within five years from the date when the cause of action accrued; (2) The Supreme Court of Illinois erred in refusing to consider the case upon direct appeal to it from the trial court, but transferred it to the Appellate Court of Illinois; (3) The Appellate Court erred in sustaining the judgment of the trial court; (4) The Appellate Court erred in refusing to find that petitioners had been deprived of rights guaranteed by the Illinois Constitution; (5) The Supreme Court of Illinois erred in refusing to grant an appeal from the Appellate Court.

In short, the petitioners are complaining, not want of due process but of alleged erroneous decisions of the State courts in course of the usual judicial process. The Federal Constitution offers no guarantee of correct decisions.

Ballard v. *Hunter*, 204 U. S. 241, 258;
Chicago L. Ins. Co. v. *Cherry*, 244 U. S. 30.

Petitioners were given their day in court. They filed their complaint through counsel and were given full opportunity to resist the defendants' motion to dismiss the complaint. The trial court took the view that the undisputed allegations in the complaint disclosed that it was not filed within the time required by statutory limitations. Dismissal for such reason is a time honored procedure and no case can be found questioning the fact that it is due process. From a constitutional point of view it is immaterial whether the decision of the trial court is correct or erroneous.

It is also well settled that appeals are not essential to due process.

McKane v. *Durston*, 153 U. S. 684, 687.

Even a statute which declares that writs of error in criminal cases punishable with death to be writs of grace and not writs of right does not violate the Federal Constitution.

Andrews v. *Swartz*, 156 U. S. 272.

Accordingly the decision of the Illinois Supreme Court upon the attempted direct appeal that there was no debatable constitutional question involved warranting its assumption of jurisdiction does not draw in question any right under the Fourteenth Amendment.

Thorington v. *Montgomery*, 147 U. S. 490, 494.

In the Appellate Court of Illinois the petitioners were given a full hearing upon printed briefs filed by them and were given a written opinion assigning reasons for the decision of the court. Pursuant to statute petitioners filed their petition for leave to appeal to the Supreme Court of Illinois but failed to convince the latter court that the Appellate Court had erred.

Petitioners complain that the opinion of the Appellate Court was brusque. There was no need for a lengthy opinion. The real issue in the case had been repeatedly determined by the Illinois courts in *Blakeslee's Warehouses* v. *City of Chicago,* 369 Ill. 480; *Cohen* v. *City of Chicago,* 377 Ill. 221; and *Chapralis* v. *City of Chicago,* 326 Ill. App. 554. It is not surprising that the Illinois courts refused to consider seriously the fantastic theory which petitioners evolved in an attempt to circumvent the well settled rule laid down in the three last cited cases that suit must be brought to recover interest within five years after the principal of a judgment has been paid in full.

The petitioners have had full and fair hearings in the State courts and the judgments therein have been in conformity with reason and settled law. The petition for certiorari should be denied.

Respectfully submitted,

BARNET HODES,
Corporation Counsel of the
City of Chicago,

Attorney for Respondents.

J. HERZL SEGAL,
Head of Appeals and Review Division,
Assistant Corporation Counsel,

Of Counsel.